

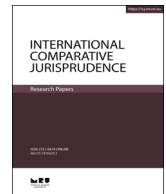
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## Competition law and the social market economy goal of the EU<sup>☆</sup>



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### ABSTRACT

The present study asks whether the enforcement of competition protection, according to Art. 101, 102 and 106 TFEU, causes conflict with measures belonging to the EU's social market economy model. Integration of the social market economy objective into the EU's goals was newly stated in Article 3 (3) TFEU and it is therefore of interest to find whether it has have so far any impact on the traditional EU's competition law approach towards clashes between social protection measures and free competition imperatives. The study reviews first the new wording of social provisions of the EU Treaties, then it analysis the relationship between the social market economy model and the market competition in general. A more detailed attention is then dedicated to the pre-Lisbon approach of the EU Court of Justice towards agreements between social partners and to the privileged rights of organisations providing social security services. In its final part, the study examines whether this earlier established approach corresponds to the current post-Lisbon case law of the Court. The conclusion is that even though the goal of a social market economy has been so far never mentioned by the Court and its pre-Lisbon case law precedents have not been overruled, the current standard of application of EU competition rules is largely responsive towards social schemes established at the national level.

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### 1. Introduction

Since the approval of the EU Lisbon Treaty, which took place simultaneously with the outbreak of the financial and economic crisis, the issue of social rights and protection measures has been back in the spotlight at national and EU levels. In terms of EU law this reinforced accent on the social aspects has been directly required by numerous new provisions of the EU Treaties, in particular by the formulation of Article 3(3) TFEU which stipulates that the EU should follow the path leading towards a highly competitive social market economy with full employment etc. At first glance, we are witnessing a turnover from the neoliberal emphasis on deregulation, liberalisation and free competition, so popular at the turn of the century, to the values of social peace, socially and ecologically sustainable development etc. The question naturally arises whether the complex and sophisticated EU competition law, which in the late 1990s became an important tool for promoting an economic model based just on liberalisation and undistorted competition, does not stand in direct opposition to such a reversal.

Our analysis addresses these concerns on two levels. First, from the perspective of the theory it looks at the place of free competition in the concept of social market economy, as developed in the economic theory and practice of the post-war West Germany. On this theoretical level, it is especially necessary to separate the social market economy concept from the

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welfare state model as these two models add different value to the free play of market forces and do not accept the same scope of their correction by State measures. The social market economy model however, by admitting the introduction of market forces into formerly State-controlled sectors, expands the scope of potential conflicts between the free market competition and the emphasis on the protection of those social rights, which cannot be sacrificed to economic efficiency.

Hence, secondly, the need for a more detailed review of the case law of the EU Court of Justice (CJ), which is the final authority for dealing with situations in which the values protected by various provisions of EU law interfere. The goal is to ascertain whether the objective of the social market economy and other socially oriented provisions of the Lisbon Treaty have created new sources of conflict with the EU policy against cartels and abuses of dominance and to find out the way in which these conflict have been solved by CJ.<sup>1</sup> In order to compare the pre-Lisbon and the post-Lisbon solutions an outline of the traditional (pre-Lisbon) jurisprudence of CJ in the given area needs to be drafted first. It will be shown that the CJ's solutions were neither simple nor uniform as they were built on more than one type of justification that allowed the fulfillment of social goals. From this base it will be then researched if there has been, during the 2009–2015 period, any shift in the EU's standard of application of Articles 101 (prohibition of Cartels), 102 (prohibition of abuse of the dominant features of position), and also 106 (services of general economic interest) TFEU that would preclude the maintenance and development of social protection measures, of social dialogue outcomes, or of other aspects associated with the model of social market economy.

The following paragraphs, therefore, look at whether and how the EU law has succeeded so far in balancing the liberal and social values and has managed to open the way to an order of social market economy that would be both socially just and highly competitive.

## 2. The EU's social market economy goal as a specific problem

Although the Lisbon Treaty has already been in force for more than five years, some debates about the issues it has raised have still not faded away. One of them concerns the new EU target, set by Article 3(3) of the Treaty on European Union (TEU), that of *a highly competitive social market economy aiming at full employment and social progress...* This has been supplemented by the Treaty on the Functioning of the EU (TFEU) by a number of other provisions testifying to the Union's increased interest in social rights and their protection. These are, in particular, the "social" horizontal clause of Article 9 TFEU exhorting the EU to promote a high level of employment in all its policies, the guarantee of adequate social protection, and the fight against social exclusion... as well as the similarly worded rights mainly contained in Chapter IV of the Charter of Fundamental Rights of the EU, entitled "Solidarity". In a similar vein, another provision of general application should also be mentioned, that of 14 TFEU, stressing the importance of services of general economic interest "in the shared values of the Union", together with the related Protocol No. 26 *On services of general interest* and the fundamental right of access to them referred to in Article 36 of the Charter of Fundamental Rights. All these provisions of EU primary law reflect important principles for the future operation and direction of the Union, but they do not establish any directly enforceable social rights of individuals or any binding commitment among the Member States to build a harmonised European social model.<sup>2</sup>

Title X of the TFEU, entitled "Social Policy" (Articles 153 and 156 TFEU, in particular) that could have contained such a specific mandate and set of directly claimable rights, was not changed by the Lisbon Treaty, and thus does not allow the EU to do more than "support and complement" the activities of the Member States in the fields of labour and social security law. In all key issues (social security and the social protection of workers, the collective defence of the interests of workers, etc.), the Member States have retained the right of veto in the Council. The principles of social security systems (the degree of solidarity and redistribution, the involvement of social partners, etc.), and matters regarding remuneration, the right of association, and the right to strike or the right to impose lock-outs, are not even subject to EU harmonisation powers.<sup>3</sup> The

<sup>1</sup> State aid control is not included in the study, partly due to the fact that the European Commission recently clarified the question in its Commission Staff Working Document – Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest (European Commission, 2013).

<sup>2</sup> The adjective "social", whether in regard to policy or model, does not have a precisely defined content. In a broad sense, which is often used by the EU, it includes "all areas of social policy" (see Article 156 TFEU). It includes the coordination of employment measures, as well as labour rights and working conditions, training and further education, social security, protection against occupational accidents and diseases, health and safety at work, the right to associate in professional organisations and the right to collective bargaining between employers and employees. It is therefore about individual and collective entitlements, ranging from labour law through the regulation of the labour market and job training, to social protection or security, i.e. to the systematic hedging against risks in professional and everyday life (sickness and maternity benefits, invalidity benefits, including those intended for the maintenance or improvement of earning capacity, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, and family benefits) – as they were originally defined in Art 4 (1) of EEC Regulation 1408/71 as referred to constantly by the CJ in its rulings, for instance, in C-78/91 para 15, (*Rose Hughes v Chief Adjudication Officer*, 1992).

<sup>3</sup> The EU has been granted its own initiative in the field of social security by Article 48 TFEU, albeit limited to social security for migrant workers. For them, the EU aims to "create a system" that, however, does not consist in the payment of "European benefits from the European budget," but instead, in the coordination between national social security systems, so that migrant workers do not lose their entitlements acquired in different Member States and their respective benefits are paid to them in the country where they are resident. Historically, this is a result of the founding compromise under which the EU (then the EEC) was granted powers to regulate and deregulate the market (including the free movement of workers), while social security remained in the hands of the Member States, in the hope that economic growth would strengthen market integration and solve social issues. For more details, see Grass (2013), p. 83, 83–87).

forementioned Protocol No. 26 similarly excludes non-economic services of general interest, i.e. services organised and provided by the Member States, mainly in the fields of public health, social security and education (for more for details, see [European Commission \(2011\)](#)) from the scope of the Treaties (and therefore of EU law). Just from this short overview, it is clear that the Lisbon Treaty does not support its objective of a social market economy with corresponding powers to act in the field of social rights and social security. The EU's wide competence to shape trade and business within its single market has not been complemented so far by similar competencies to actively promote its own socio-economic model. The objective itself looks like an example of a frequent EU weakness, when it states in big words “what”, without giving a hint as to “how” ([Giddens, 2014](#), p. 70).

The answer to the question of “how” the social market economy objective should be fulfilled, therefore, remains unclear and has become a source of controversy. The EU Court of Justice, which can clarify the provisions of the Treaty that the legislators left without content, neither uses the reference to the social market economy goal as an argument, nor defines it in its judgments in terms of content and related measures. The European Commission seems to be more responsive in this regard, but only at a general level. It explains the aim of Article 3 (3) TEU as being an expression of the need for balance and sustainability of the model that is Europe's own and that is based on two complementary pillars: “on the one hand, the enforcement of competition, and on the other, social policy measures to guarantee social justice by correcting negative outcomes and bolster[ing] social protection.” ([Andor, 2011](#)). Andor included in the social dimension the rules on working conditions, individual workers' rights, the objective of full employment, and social dialogue. That broadly conforms to the fundamental basis of a model of post-war West Germany, rooted in the Freiburg school of Ordoliberalism and the social doctrine of the Christian Democrats. It does not, however, bring us closer to an answer to the question of what specific actions, at what level, with what degree of European harmonisation, should be adopted and implemented to achieve the objective of Article 3 (3) TEU. Therefore, it is no wonder that the majority view of scientific literature says that the current EU has no clearly and uniformly defined socio-economic model at all ([Giddens, 2014](#), p. 90; [Potucek, 2014](#), p. 141).

This is not a purely academic debate, because practical experience shows that liberal, market-oriented values are not always in harmony with the values of social solidarity and that national models of social peace sometimes come into conflict with the freedoms of the EU single market.<sup>4</sup> Since Europe is composed of several national or regional social models and the EU has no powers or resources in the budget to offer as their substitute or as an optional alternative to a common EU model, there are plenty of situations in which the right of free movement of services or non-discriminatory participation in procurement procedures exert pressure on social protection schemes based on a local compromise between labour and capital. These situations have been broadly discussed, mainly in connexion with the CJ judgments in cases C-341/05 *Laval*, C-438/05 *Viking* and C-346/06 *Rüffert* ([Bücker & Warneck, 2010](#)). This paper focuses on the conflicts between similar principles, but in particular, between the social security schemes and EU competition rules, which are to a greater extent than single market rules, unified and conferred as the exclusive competence of the EU.<sup>5</sup>

Such a potential conflict between the new social accent of the Lisbon Treaty and the EU's competition policy and law, was briefly given increased media attention at the time of the finalisation of the text of the Treaty, in mid-2007. Former French President N. Sarkozy then succeeded in expelling the provision stating that the goal of the Union is “a single market with free and undistorted competition” from the “constitutional”, horizontally operating provisions of the Treaties (*La concurrence libre et non-fauscée a vecu dans l'UE – The free competition and undistorted competition are over in the EU, 2007*). Thanks to the addition of Protocol No. 27 *On the Internal Market and Competition* and then to the conservative approach of the CJ, which refused to question the “fundamental nature of the Treaty provisions on competition” ([Italian Republic v European Commission, 2011](#)), there has been no displacement of the protection of competition on the second track between the EU policies. Clearly, however, this political event showed that a strong antitrust inspired by neoclassical economics not only disappointed the EU's left and the trade unions, but that there were also right-wing political forces that did not share the enthusiasm for the “Anglo-Saxon” free-market and its spontaneous self-regulation. On the other hand, the financial, economic and ultimately debt crises that plagued the EU in the years following the adoption of the Lisbon Treaty, did not bring victory of the social over the free market in the EU. The problems of the welfare state, caused by the erosion of many assumptions on which its postwar success had been built, have not yet found a satisfactory solution and the pressure of “austerity” on its expensive and solidarity requiring schemes of social security and health insurance has not diminished.

### 3. The social market model and free competition

Before analysing the conflicting aspects of the social market economy and EU competition law, it is necessary to remember that the historical and also the current interpretation of the social market economy concept is not identical to the well-known leftist “welfare state”, and is not therefore, hostile to the vigorous enforcement of competition law. The

<sup>4</sup> It is sometimes called the “Janusian character of the EU”, as the efforts towards further liberalisation, deregulation, flexibility and economic efficiency and competitiveness are increasingly at odds with the ideals of social justice and social rights, participative prosperity, the fight against poverty and social exclusion. For more details, see [Potucek \(2014\)](#), p. 142–143 and [Grass \(2013\)](#), p. 14–15, 21–24.

<sup>5</sup> Under Article 3(1) TFEU, the establishment of the competition rules necessary for the functioning of the internal market belongs to the exclusive powers of the EU, while the internal market as such as well as the social policy form part of the powers shared between EU and Member states pursuant to Article 4(2) TFEU.

aforementioned quotation from the speech by a former Commissioner for Social Affairs Andor testifies to this, as well as the words of another former Commissioner – for Competition – Monti, according to whom the social market economy “calls for a maximum of free market, for reliance on competition wherever possible” (Monti, 2000).

Looking back, one cannot forget the strong warning of one of the key figures of the postwar social market economy in Germany, Ludwig Erhard, against a collectivist welfare state. This model of social policy was structurally different from his concept and signified in his eyes, a slide into a “social order under which everyone has one hand in the pocket of another” (Erhard, 1957). According to Erhard, it was not possible for an economic order to exclude private initiative, foresight and responsibility, although it should not have simultaneously meant a value-neutral attitude of the State, as it was the public duty to carry out social policy that would be closely tuned to economic policy. A similar approach was taken by the author of the term ‘social economy’, Alfred Müller-Armack, who in the postwar era promoted the market conformity of all social measures, which meant, on the one hand, the rejection of state-guaranteed social and health insurance as well as of the enactment of a minimum wage, and on the other hand, the preference for social security built primarily on individual responsibility, not on a mandatory solidarity among social classes and generations (for more details Zweig (1980)). At the same time, the “effective and workable” or even “complete” competition represented by the founding fathers of the concept of the social market economy, the very foundation of the economic order, most importantly, needed to be vigorously protected from restrictions caused by both market operators and state power (Crane & Hovenkamp, 2013, p. 252–281).

It is obvious that if social security insurance were individually financed (albeit with mandatory participation), and provided by competing market players, while the state would reduce its active role to e.g. a negative income tax for low-income families plus limited financial support of the neediest, such a system, by its very nature, would not clash much with the competition rules.<sup>6</sup> The state would offer blanket fiscal reliefs and aids of a social nature, granted to individual consumers, i.e. measures in conformity with the rules on state aid (Art. 107 TFEU) that do not affect the scope of Articles 101, 102, or 106 TFEU. It would not create state monopolies or companies entrusted with exclusive rights. Possible cartels between commercial insurance and social services providers would be matters for the standard application of Article 101 (1), or, in justified cases, would be exempted from the prohibition under Article 101(3) TFEU. The development in most countries, however, went the other way starting from the 1960s, and the social security systems have taken up precisely those elements that the founding fathers of a social market model warned against: compulsory collective solidarity, generous social security, exclusive rights for entities providing social services, a guaranteed minimum wage, etc. Should the EU, when seeking now to return to the social market model, act against these elements of social schemes shared by the majority of EU Member States?

To some extent, this is so. Contemporary proponents of a social market economy are critical of financially unsustainable welfare states, which have developed a mentality of welfare dependency in their clients, a low level of responsibility for their own destiny and a tendency to abuse the benefits provided free of charge. Not only German authors who have been consistently updating the model of a social market economy (Zweig, 1980; Eisel, 2012; Franke & Gregosz, 2013), but also supporters of the welfare state modernisation from the UK (Giddens, 2014) or the south wing of the EU (Gil-Robles, 2014) emphasise that the future does not lie either in the leftist defence of universal social security entitlements or in the right-wing policy of austerity that deepens social divisions and causes social conflicts. Virtually all without exception consider the state-guaranteed system based on compulsory solidarity only a subsidiary “emergency brake” and put the emphasis on what Anthony Giddens calls a “social investment state”, i.e. on measures that increase the opportunities of individuals in the labour market or his/her individual business. This means measures to encourage the individual initiative and to remove the regulatory barriers that discourage it. The redistribution of collected taxes should therefore, first of all, ensure that everyone gets, and even repeatedly during his or her lifetime, the possibility of access to education, to the market, and to a profession. Only a minor part of the social budget should provide the necessities to those who, despite these social investment measures have become needy.<sup>7</sup> This concept looks closer to economic reality than the provision of all-embracing welfare regardless of individual effort and cost to society. However, does this approach to social security also conform more to competition rules?

Practice shows that the source of tension between social and competition rules has developed hand in hand with the gradual liberalisation of state provided services when, in the interest of greater efficiency, the market and the private initiative were admitted into systems that had been previously fully guaranteed, financed and controlled the state. If the entire system of help in situations when a person is not able to help him/herself (injury, illness, age, job loss, etc.) were excluded from the operation of market forces and remained entrusted exclusively to state organisations providing services “from the cradle to the grave”, there would be no economic activities carried out by undertakings and the competition law would not be applicable at all. It is no coincidence that the CJ judgments about who should also be considered as an undertaking within the meaning of competition law began to proliferate from the 1990s, when private commercial

<sup>6</sup> Where the state performs its basic functions (the exercise of “imperium”) and uses the monopoly of state coercion in the public interest, then even if it transferred certain powers to an entity distinct from the state, there is no market and there is no potential for competition with private operators. More details in (Winterstein, 1999, p. 328–329).

<sup>7</sup> Typical social market economy measures primarily include employment policy, support for SMEs and small investors as a way to individual welfare, the mandatory participation of all people with private income in social risk insurance, in which employees contribute together with employers. Furthermore, it includes a reasonably progressive income tax in order to finance an education system open to all and social protection for the most needy. The question of wages and employee benefits should not be solved by the state, but through collective bargaining between social partners.

initiatives were admitted in a number of sectors that had been traditionally reserved for public power (*Klaus Höfner and Fritz Elser v Macroton*, 1991; *SAT Fluggesellschaft mbH v Eurocontrol* (1994); *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* (1993); *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* (1997); *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (1999); *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities*, 2003; *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* (2001); *AOK Bundesverband, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft and See-Krankenkasse v Ichthyol-Gesellschaft Cordes, Hermani & Co.*, 2004).

In short, it could be argued that the unsustainability of state-sponsored and organised welfare and the subsequent partial transition to an efficiency driven by private initiative and competition has created a new potential of conflict with competition law. Quite understandably, the full transition to the competition-based ideal of individually contracted and financed insurance against all odds of life proved unrealistic, since the massive “solidarity” redistribution from those with sufficient income to those with low or no income cannot be stopped that simply. Furthermore, the social market economy model also takes into account the role of the social partners and their collective bargaining, which would result in binding agreements on labour cost, or a sector system of mandatory insurance. Also, it still appears to be more acceptable to compensate the costs of providing universally accessible public services with one selected provider, than creating complex systems of individual aid to consumers who find themselves out of the situation in which the market by itself would provide them with transport, health or education services. These mixed situations in which cartels and monopolies can have a social mission, provide far more fertile ground for interesting and complex competition cases than the situation with zero, or completely free competition.

#### 4. Protection of competition and social objectives – outline of the traditional approach

The UNCTAD study on exceptions to the application of competition rules is based on a premise that is in compliance with the concept of a social market economy: “competition law should be a general law of general application, that is the law should apply to all sectors and all economic agents in an economy engaged in the commercial production and supply of Goods and Services.” (*Khemani*, 2002, p. 5). What at first glance looks like an effort to perfect competition in all countries in the world, not just in the EU, however, is everywhere mitigated by numerous exceptions consisting of either the full exemption of certain activities or entities from the scope of competition law, or in the provision of case by case exemptions from specific prohibitions. This basic scheme – exclusion from the application of competition rules or an exemption from their ban – can also be used to examine the relationship between EU competition law and the social components of the social market economy. The EU itself so far has no accepted methodology of how to “integrate public policy considerations in competition decisions” and numerous exceptions (and exceptions to these exceptions, which limit their scope) must be inferred from the case law, which evolves over time (*Monti*, 2007, p. 112).

First, there is an exemption provided by Protocol 26 of the Treaty for non-economic services of general interest, which appears to be full scale and unconditional. This category of services includes statutory and complementary social security schemes, as well as customised essential services provided directly to the person (*European Commission*, 2013). This does not mean, however, that activities whose declared aim is social, whose functioning is non-profit based, and whose clients are individuals requiring support and assistance, are *en masse* excluded from the provisions of the Treaties, including their antitrust articles. The Commission itself notes that some social services of general interest are subject to competition regulation. This exception to the exception are those services which instead of being the exercising of state monopoly power and regulatory functions, meet the definition of economic activity and are therefore carried out by undertakings within the meaning of competition law. CJ case law, long before the Lisbon Treaty, inferred that economic activity means the offering such goods or services (i.e. not just purchasing them for the needs of hospitals, nursing homes, etc.) that would, at least potentially, be also provided by private commercial entities (*Klaus Höfner and Fritz Elser v Macroton GmbH*, 1991; *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities* (2006)). Neither public status alone nor social purpose is sufficient to exclude the activity from being “economic” and the bodies operating them from being “undertakings”.

The dividing line can be traced, according to settled case-law of the CJ, around activities that are performed without any consideration by the state or on behalf of the state, as part of its duties in the social field. Non-economic social services will therefore be those provided by a compulsory, solidarity-based system of insurance (health, retirement, social) where contributions, as well as benefit payments, are fixed by the legislator and distributed benefits thus do not match the size of individual contributions (*Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon*, 1993; *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche*, 1995; *José García and others v Mutuelle de Prévoyance Sociale d'Aquitaine and others*, 1996; *Cisal di Battistello Venzano & C. Sas v INAIL*, 2002; *Freskot AE v Elliniko Dimosio Freskot*, 2003). If these conditions are simultaneously met, the CJ even allows “some competition” and still considers the entities involved as not having the status of undertakings. It admitted that in its decision of 2004 regarding German sickness funds (*AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der*



Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft and See-Krankenkasse v Ichthyol-Gesellschaft Cordes, Hermani & Co (2004) where, according to the Court, the competitive bidding of minor benefits in order to attract clients did not convert health insurance companies into subjects of competition law.

The second type of approach to behaviour with social meaning or purpose was adopted by the CJ in the cases of agreements concluded between social partners in the context of their collective bargaining. The EU Court defined this approach at the turn of the millennium in the judgment C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (1999); see also *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* (1999) and *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* (1999). In paragraph 59 of its decision, the CJ admitted that “*It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.*” Social peace, accepted as a goal of primary importance, may thus outweigh the interest of free competition and exclude the application of Article 101(1) TFEU to collective agreements.

In the subsequent case law relating to cases of agreements exceeding the area of collective bargaining, where the CJ decided that entities involved were undertakings (*Wouters, Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, intervener: *Raad van de Balies van de Europese Gemeenschap* (2002); *David Meca-Medina and Igor Majcen v Commission of the European Communities*, 2006), the situation evolved towards acceptance of a certain “rule of reason”. The solution here, however, is not about assessing the possible exemption from the prohibition of agreements pursuant to Article 101(3) TFEU. The “rule of reason” means that a decision is taken about whether the prohibition of Article 101(1) TFEU would be applied to the agreement itself.<sup>8</sup> Thus, the rule is not that every agreement concluded in the exercise of collective self-government of a particular sector should escape the application of competition law in the same vein as collective agreements between workers' and employers' organisations. It is possible, however, as in the cases of obstacles to the free movement of goods or services on the EU Single market, to apply a test of whether the agreement is pursuing an important public goal (or mandatory requirement), and whether the chosen arrangement is a necessary and proportionate way to achieve such a valuable objective. The quasi-automatic immunity of collective agreements concluded between social partners can be considered in this context as a special case within the broader “rule of reason” approach.<sup>9</sup>

If an undertaking created under such an agreement is acting e.g. as an administrator of an insurance fund into which the companies and their employees have an obligation to contribute, there is a danger of the abuse of a dominant position and therefore, the need for review pursuant to Article 102 TFEU. Although some authors argue that the same “rule of reason” test can be applied (*Chalmers, Davies and Monti*, 2010, p. 971), the situation seems to be a bit more complicated. In such cases, EU competition law does not apply the principle of prohibition as it does against cartels (even the *per se* prohibition in hardcore cases), but rather the principle of abuse when the sanction targets not the achievement of a dominant position, or the granting of a monopoly, but its concrete manifestations of an anti-competitive nature. And because the obligation to contribute to a social scheme cannot be imposed without state approval, there is also the question of the application of Article 106 TFEU, i.e. the question of whether entrusting an undertaking with a certain exclusivity does not lead to distortions of competition and, if so, whether such interference is necessary for the performance of social services of general interest. This approach has already been adopted by the CJ in the aforementioned judgments *Albany* (paras 98 et seq.), as well as *Maatschappij Drijvende Bokken* and *Brentjens' Handelsonderneming BV*, all of them from 1999. It may be asked if a fairly detailed examination of whether the conferred monopoly was an effective and necessary solution to the task to provide a social service is rather similar to the use of the rule of reason in not applying Art. 101 (1), or whether it more closely resembles an assessment conducted under Article 101(3) TFEU criteria for the exemption from the prohibition.<sup>10</sup> Whether it is one way or another, the reference to Article 106 (2) TFEU provides a good bridge to another type of socially-motivated exception from the competition rules.

The third type of approach of the EU competition law to the relationship between social and competition rules consists in a looser interpretation of the criteria for exemption from the prohibition under Article 101(3) or, in the case of services of general interest, pursuant to Article 106(2) TFEU. Under this approach, the benefits of an exemptible agreement do not depend on produced efficiencies and benefits for buyers in the same relevant market, but when a wider variety of positive outcomes, including those in the social field, are taken into account. G. Monti specified four different types of such an

<sup>8</sup> See the AG *Cosmas' Opinion in C-51/96 Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL*, 1999, para 110: “Article 85 (1) does not apply to restrictions on competition which are essential in order to attain the legitimate aims which they pursue. That exception is based on the idea that rules which, at first sight, reduce competition, but are necessary precisely in order to enable market forces to function or to secure some other legitimate aim, should not be regarded as infringing the Community provisions on competition.”

<sup>9</sup> The fact that “workers” are not “undertakings” represents here another explanation of why competition law does not apply to agreements concluded by them.

<sup>10</sup> It is true that the balancing of the various objectives of the Treaty and therefore of not applying Article 101 (1) TFEU belongs to the EU authorities, while an exception from the ban should be sought by evidential activity of the enterprises themselves. In the case of application of Article 106 (2), the situation is somewhat blurred, as services of general interest are both a “value of the EU” (see Article 14 TFEU) and the Commission has a certain harmonisation power towards them (Article 106(3) TFEU), while their definition and organisation remain in the hands of the Member States and to whom they are supposed to certify with concrete evidence that the performance of these services is efficient enough, and that its sustainability requires an exemption from the competition rules. See for instance, (*Schweitzer*, 2011, p. 40–41).

extension, which can be found in the previous decisions adopted by the Commission and the European Court of Justice.<sup>11</sup>: (i) redefinition of economic efficiency to include other public policy consideration, (ii) use of non-economic benefits as factors to tip the balance in favour of granting an exception, (iii) granting of conditional exception and use of remedies to achieve the public policy goal, (iv) finding that the non-competition consequences of the agreement are of such importance that if an agreement is inefficient but contributes to another Community policy, it is exempted (Monti, 2007, p. 115–117).

However, during the so-called modernisation of EU competition law, i.e. right after the year 2000, the Commission adopted a less accommodative stance and did not take any decision that would further develop this approach. On the contrary, in its Guidelines on the application of Article 81(3) from 2004 (paras 42–43) (European Commission, 2004) it refused to take into account the benefits of an agreement which would not fit the efficiency requirement understood in the economic sense, or the benefits that would be located in another market or addressed to another category of beneficiaries. In the new millennium, the Commission confirmed this narrow standard in its negative attitude towards the so-called “crisis cartels” (*Competition Authority v Beef Industry Development Society Ltd. and Barry Brothers Meats Ltd*, 2008), by which it indicated that “the survival of an industry and employment, it seems, no longer enters into the equation” (Witt, 2013, p. 20). Against this view of the Commission stand the decisions of the EU General Court that did not require such rigour and explicitly admitted other benefits (For instance *Compagnie Générale maritime and others v. Commission* (2002); *CMA GCM and Others v Commission* (2003)). In this regard, it could be expected that the highlighting of social objectives in the EU Lisbon Treaty would not only push in favour of the extended interpretation of the criteria for exemption under Article 101 (3), but also 106(2) TFEU. Last but not least, the Commission has also mitigated its modernisation fervour based on neo-liberal economics since the outbreak of the financial and economic crisis in 2008.<sup>12</sup>

Although it is not typical for cases where social goals and impacts are taken into account, two other means of escape from EU competition rules cannot be ruled out. Some agreements between undertakings may fall under the limits set for the *de minimis* rule, or may be set aside as purely local issues with no impact on trade between the EU Member States. These cases of negligible impact on competition, specifically on inter-state trade, would nevertheless be rare in the social field, as the effectiveness of social measures usually requires agreements between labour and capital of at least regional scope, or the collective decisions of the autonomous bodies of a profession or industry, as evidenced by the above-mentioned cases. For the sake of completeness, however, it is also possible to include these two paths in the outlined methodology.

A table summing up the approaches explained above, accommodating EU competition law with social security schemes and outlining the successive steps of analysis, would look as follows (the subsequent step comes into consideration whenever the exemption is not available in the preceding step):

| Step | Key argument  | Criteria to fulfil  |
|------|---|---|
| 1    | No economic activity/no undertaking   | Only purchasing and no selling activity, OR at the same time:<br>1. Compulsory participation<br>2. Redistribution based on the solidarity principle<br>3. State control |
| 2    | No appreciable effect on competition/inter-state trade  | Criteria expressed in the Commission's <i>De minimis Notice</i> (2014) and the Commission's Guidelines on the effect on trade concept (2004)                            |
| 3    | Social goal (of a collective agreement/regulation) would be undermined if the competition rules applied | Social partners' collective bargaining, OR the rule of reason test:<br>1. Legitimate social goal<br>2. Necessity<br>3. Proportionality                                  |
| 4    | Benefits of general interest  | Criteria set by of Art 101(3) and 106 (2) TFEU, interpreted in a socially responsive manner   |

## 5. Post-Lisbon developments

The conclusions and the table presented in the previous section are based on decisions taken by the EU competition authorities before 2009, i.e. before the Treaty of Lisbon came into effect, thus at a time when the EU did not pursue the objective of a highly competitive social market economy. Although the new socially-oriented provisions of this Treaty may lead to the conclusion that the possibility of exclusion of socially oriented activities from the application of counteracting rules of the EU law could only further expand, the answer can hardly be that straightforward.

<sup>11</sup> In the competition law literature, the following cases are often quoted as examples of a wider application of article 101(3) TFEU criteria: *Commission decisions IV/30.810 – Synthetic fibres OJ* (1984), IV/34.456 – *Stichting Baksteen OJ* (1994), IV/33.814 – *Ford/Volkswagen OJ* (1993) and CJ decisions in cases 26/76 *Metro SB-Grossmarkte v Commission (Metro I)* (1977) para. 43, 75/84 *Metro SB-Grossmarkte v Commission (Metro II)* (1986) para. 65, 42/84 *Remia BV and Others v Commission* (1985) para. 42 where it stated that “provision of employment fell within the framework of the objectives to which reference could be made under Art (now) 101(3), because it improved general conditions of production, especially where market conditions were unfavourable.”

<sup>12</sup> See for instance Šmejkal (2011). It became clear that especially under Commissioner J. Almunia, DG Competition returned to a balance between social fairness and market efficiency, openly referring to the social-market economy model.

It has already been mentioned that the CJ has refrained from using the social market economy objective in its reasoning, even though – unlike their Advocates General (*Opinion of AG Cruz Villalón in C-515/08 (2010)*; *Opinion of AG Kokott in C-557/12 (2014)*) – a reference to it has never been made.<sup>13</sup> In the post-Lisbon period, the CJ adopted decisions which strengthened the impact of EU measures ensuring non-discrimination, equal treatment and individual social-employment rights (paid annual leave, rights of family members or migrating workers), as well as the decision that earned it criticism from the European Left for anti-social decision making. This was the case of judgments dealing with a conflict between the liberal freedoms of the EU internal market and the nationally or locally specific (often adopted by social partners) conditions imposing some duties on the winning contractor in public procurement tenders, or setting the retirement age, or regulating temporary agency employment.<sup>14</sup> The CJ basically followed there on its jurisprudence *Laval* and *Viking* from the pre-Lisbon period that had been so harshly criticised by trade unions and left-wing activists. Applying the usual “breach-justification-proportionality” test, the CJ came to conclusions that did not please those who had hoped that under the Lisbon Treaty, social rights would not be seen as an uncertain exception to the freedoms of the EU Single market, and that they would become superior to those freedoms. When dealing with single market issues, the CJ therefore continues the uneasy balancing of economic freedoms and social rights, thus being of no help to politicians who inscribed an objective in the Treaty without reaching a specific agreement on its meaning and implementation.

In the competition field, as shown above, the CJ used to be more social-minded, even before the Lisbon Treaty. The judges’ approach has suggested that EU rules on free movement and non-discrimination are essentially universal in their application, while EU competition rules are designed to strengthen and complete the single market only where economic activities and profit goals prevail. The Table of exemptions from the rules of competition (above) is certainly not applicable to the freedoms of the EU single market. In the post-Lisbon period, the CJ has several times been given the opportunity to ponder social rights and undistorted competition requirements when dealing with references for preliminary rulings from national courts. It is quite symptomatic that these cases were first dealt with at a national level, not by the Commission’s decision. In the context of decentralisation of EU competition law enforcement, the Commission has been focusing on large-scale international cartels and abuses of dominance by multinational companies. For cases with social elements, however, it is quite typical that they originate from local disputes about the consequences of social partners’ agreements in the different sectors of a national economy.

The oldest of these CJ decisions is the case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft* (2009) (i.e. before the actual effect of the Lisbon Treaty). In substance, it was about the legal obligation of businesses operating in Germany to become members, in respect of insurance against accidents at work and occupational diseases, of the *Berufsgenossenschaft* (a professional association), to which they materially and territorially belong. They are then obliged to pay the association their insurance contributions calculated on the basis of the wages and salaries of the insured persons. The Kattner company intended to take out private insurance against the risks involved, which brought them into conflict with the professional association in the engineering and metalworking sector (“MMB”). The CJ had, among other things, to address the question whether the MMB was an undertaking subject to Articles 101 and 102 TFEU. On the basis of the standard assessment derived from their previous case law, the Court first explored the nature of solidarity, on which the insurance scheme was based and then the question of state supervision over it. It found that:

*“...a body such as the employers’ liability insurance association at issue in the main proceedings, to which undertakings in a particular branch of industry and a particular territory must be affiliated in respect of insurance against accidents at work and occupational diseases, is not an undertaking within the meaning of those provisions, but fulfils an exclusively social function, where such a body operates within the framework of a scheme that applies the principle of solidarity and is subject to State supervision, which it is for the referring court to verify.”* (Decision, part 1)

By this decision, the CJ thus confirmed its earlier established approach towards managing the bodies of social insurance systems and repeated the criteria that must be fulfilled to exclude them from the category of undertakings, and therefore from the application of EU competition law. In the spirit of the already cited case law *AOK Bundesverband*, the ECJ maintained the stance that: *“the fact that employers’ liability insurance associations such as MMB are given that degree of latitude, within the framework of a system of self-management, in order to lay down the factors that determine the amount of contributions and benefits cannot as such change the nature of those associations’ activity.”* (para 61) In the same vein, the non-undertaking status of MMB was not affected by the fact that providers from the other Member States were able to offer similar services.

Another notable decision was taken by the CJ in the case C-437/09 *AG2R Prévoyance v. Beaudout Pere et Fils SARL in March 2011*. Its factual side was quite similar to the *Kattner* case: a local dispute where the plaintiff, the company Beaudout Pere et Fils SARL, refused to participate in the system of compulsory health insurance managed by a non-profit organisation AG2R for the whole sector of artisanal bakery in France. The difference, however, laid in the fact that under French law, the participation of employers in such schemes may be stipulated in a collective agreement between the representatives of

<sup>13</sup> The General Court referred to it once in the decision T-565/98 (*Corsica Ferries France SAS, 2012*), where it accepted that for a reasonable private investor in the social market economy, the payment of an additional redundancy payment would constitute a legitimate and appropriate practice, nevertheless it stressed that social or political goals cannot stand alone and cannot exclusively prevail over economic logic. See paras 82–83 of the judgment.

<sup>14</sup> See for instance, the CJ rulings in cases (*Commission v. Germany, 2010*; *Gisela Rosenbladt v Oellerking Gebäudereinigungsges, 2010*; *Reinhard Prigge and Others v Deutsche Lufthansa AG, 2011*; *Commission v. Belgium, 2011*; *Bundesdruckerei GmbH v Stadt Dortmund, 2014*).



employers and employees. By an act of the Minister of Labour, such an agreement could become mandatory for all employees and employers in the given sector. In its decision, the CJ reiterated its approach to collective agreements of the social partners aimed at improving the conditions of work and employment: they do not fall, because of their nature and objectives, within the scope of Article 101 (1) TFEU. This is true regardless of the fact that accession to such an agreement is made compulsory for companies of a particular sector in a particular Member State. As Article 101(1) TFEU does not apply to such an agreement, the EU law (namely Article 4(3) TEU – the duty of loyalty) could not prevent a Member State from decreeing the participation in it mandatory without any exemption from this requirement (paras 29–38). Exclusion of collective agreements from the EU anti-cartel law that the CJ first found in *Albany* has thus been reaffirmed.

Given that the nonprofit entity AG2R was chosen by the social partners themselves to manage their insurance from companies offering services on the market of health and social insurance, the CJ came to the conclusion that although the system was endowed with a high degree of solidarity, the AG2R showed a remarkable degree of independence. In such a case it was very likely, according to the CJ, that the AG2R was an undertaking engaged in economic activity, albeit it had to be assessed in detail under the particular circumstances by the national court. If the AG2R was an undertaking, the question must be raised of the application of Articles 102 and 106 TFEU, since this undertaking had been entrusted by the Minister with the exclusive right to collect payments and manage the insurance scheme. The CJ stayed here with its settled case law from the 1990s and noted that the abuse of a dominant position could occur if the statutory conditions themselves led such an undertaking to abusive conduct, especially if the grant of an exclusive right created a situation in which the monopoly was apparently unable to satisfy the demand for the service (*Klaus Höfner and Fritz Elsner v Macroton*, 1991). Since the same insurance services, maybe even on better terms, had been offered on the French market by other providers, the creation of such a monopoly for the whole business sector was likely to restrict competition (although it had not been proven that businesses insured with AG2R were dissatisfied with its services). The CJ therefore decided to examine whether the exemption from competition constraints may be granted pursuant to Article 106(2) TFEU, and applied to undertakings entrusted with the operation of services of general economic interest (paras 70–73).

The Court itself, based on facts known to it, through relatively brief considerations (paras 74–81), referring to its earlier decisions of cases *Albany*, *Maatschappij Drijvende Bokken* and *Brentjens' Handelsonderneming BV* from 1999, concluded that the exception of Article 106(2) TFEU was applicable to the insurance monopoly of the AG2R. Insurance at an affordable price requires that the system is not left by contributors representing a lesser insurance risk. This requirement can justify the exclusive right of the AG2R to manage a system in which participation is made compulsory for everyone in the sector. Without such exclusivity, it would not be able to perform a task of general economic interest under “economically acceptable conditions”. Hence, the CJ concluded that: “Articles 102 TFEU and 106 TFEU must be interpreted as not precluding, in circumstances such as those of the case in the main proceedings, public authorities from granting a provident society an exclusive right to manage that scheme, without any possibility for undertakings within the occupational sector concerned to be exempted from affiliation to that scheme.” (Decision, part 2)

The CJ approach, in this case, answers the question of whether admitting more commerce and competition into the provision of social security must lead to a conflict with EU competition rules. A Member State, by supporting the decision made by social partners that choose their exclusive administrator or social insurance scheme from commercial entities, empowered the undertaking with a service of general interest. There would be no complete exemption from the EU rules of competition for such a monopoly, as there would have been in the case where the system were managed by a body established under a specific law and subject to regulation and control by the State. The conflict with the competition rules still may not occur. The CJ, undoubtedly aware of “the inevitable tension between social security law and competition law”, offered a very friendly interpretation of exception pursuant to Article 106(2) TFEU. Should a solidarity-based mechanism ensuring the attainment of the social objective become unsustainable “under economically acceptable conditions” for a company in charge when it is subject to competitive pressures, then EU competition law grants an exception. This is the conclusion reached by the CJ in favour of the AG2R, without referring to the need to assess specific conditions by the national judge, as the Court did in earlier decisions.

This positive approach by the CJ to the social partners' collective agreements securing workers' rights was recently confirmed by the judgment in case C-413/13 *Kunsten en Informatie Media v. Staat der Nederlanden* adopted in December 2014. In this case, a trade union representing musicians, both employed and self-employed ones, negotiated a collective agreement with an organisation representing orchestras in the Netherlands. Because the self-employed musicians were also included in the agreement, the Dutch competition authority (in accordance with the European Commission) found that the CJ jurisprudence exempting collective agreements between representatives of labour and capital was not applicable to the case. The CJ in response to a preliminary question from the Dutch court confirmed that the self-employed should normally be treated as undertakings and agreements with their participation were therefore potential cartels not falling under the exception created by the decision by *Albany* case law and confirmed by e.g. the recent decision *AG2R Prévoyance* (para 30).

At the same time, however, the CJ distinguished between the self-employed and the falsely self-employed, using the functional approach: those engaged in paid work, without being able to independently determine their own conduct and without bearing the financial and economic risks of their entrepreneurship, fit far more into the category of “worker”, as defined by EU law. Based on this reasoning, the CJ concluded that the principle of the *Albany* decision could also be applied when dealing with an agreement involving the falsely self-employed. Article 101(1) TFEU, therefore, would not apply to their agreement. The CJ even stressed (para 40) the beneficial social effects of such an approach: falsely self-employed individuals as service providers covered by the agreement will be guaranteed higher basic pay; they will pay higher contributions to pension insurance schemes and will be eligible for a higher level of pension in the future.

The CJ obviously left it to the national court to determine whether participants in collective agreements were actually falsely self-employed in the sense as defined in its judgment. It is essential, however, that this judgment responds to another trend of contemporary society, which is the replacing of traditional employment jobs by self-employed persons hired for the same type of work performed under the same conditions as if they were employees. By rejecting the negative opinion of competition authorities, the CJ took a significantly more accommodating position for the social security of all market participants in the actual position of “workers”. In the words of the judgment: “*Service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU.*”

## 6. Conclusions

So far, only a limited number of judgments from the post-Lisbon period that could be analysed have been covered. Nevertheless, it is possible to rely on the following facts, which undoubtedly arise out of them.

The CJ remains faithful to its case law from the 1990s, on which the analytical methodology of this study has been built. The case law of *Albany*, *Berntjens' Poucet et Pistre*, *AOK Bundesverband* and others has not been overcome. The exemption from EU competition rules has been neither rejected nor narrowed. Moreover, the CJ in its present judgments constantly refers to this case law as the basis of the EU competition law approach to agreements and entities with predominantly social objectives.

On top of this, the CJ has extended the scope of the exceptions established by the older judgments to new situations occurring in the field of labour relations and social security. Even if the state itself was not the provider or a strict supervisor of social insurance schemes, it might not bring them into conflict with the rules of competition, as was shown by the CJ in the *AG2R Prévoyance* judgment where a generous application of exemption pursuant to Article 106(2) TFEU was made, without requiring any detailed evidence from the Member State and its national court. Similarly, the transition of dependent workers from regular employment relationships to self-employed status does not mean their exclusion from collective bargaining, which enjoys exemption from the provisions of Article 101(1) TFEU.

Although the CJ did not refer in any of the cited judgments to Article 3(3) TEU or to the EU target of a highly competitive social market economy, it seems that its stance on issues of protection of competition is quite helpful towards this new EU goal. If, following the European Commission's opinion, the social component of the EU's model of social market economy consists first of all in ensuring suitable working conditions, the guarantee of individual employment rights and the role of social partners and their dialogue as the main tool for their further development (Andor, 2011), then EU competition law is not a stumbling block barring the way.

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